(21)

No. 556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

DORA ROBERTS,

Petitioner,

v.

JOSEPH D. NUNAN, JR.,
Commissioner of Internal Revenue,

Respondent.

Petition For a Writ of Certiorari to The United States Circuit Court of Appeals For the Fifth Circuit and Brief In Support Thereof.

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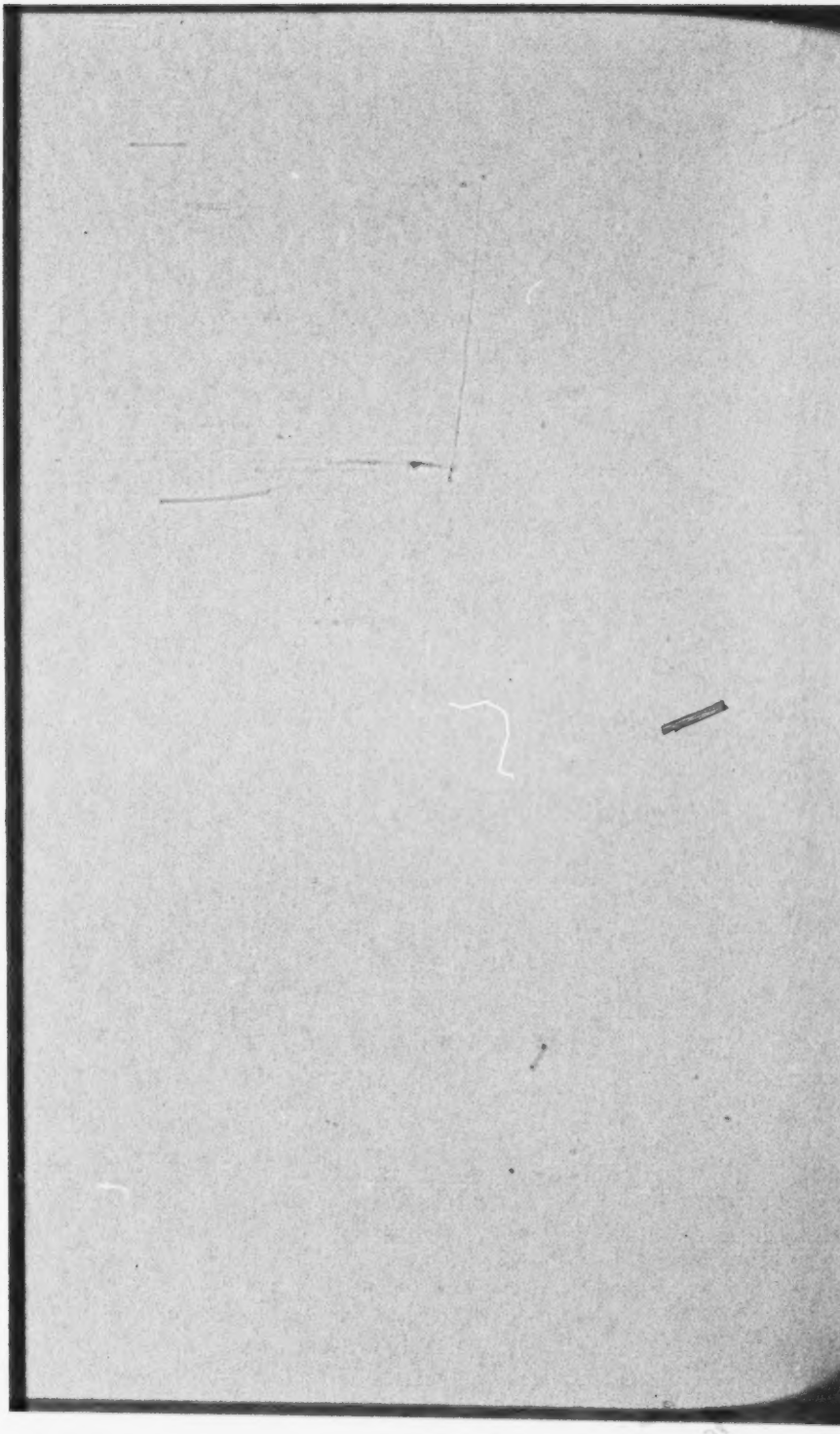

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OCTOBER TERM, 1944

DORA ROBERTS,

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v.

JOSEPH D. NUNAN, JR.,
Commissioner of Internal Revenue,

Respondent.

Petition For Writ of Certiorari to The United States Circuit Court of Appeals for the Fifth Circuit

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Dora Roberts prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled cause on July 7, 1944, affirming a decision of The Tax Court of the United States.

Question Presented

Whether irrevocable gifts of money made by petitioner in the calendar years 1938, 1939, 1940 and 1941 to two minors and one adult (her grandchildren) are required to be classified as gifts of "future interests," and, therefore, excepted from the exclusions from taxable gifts provided by *Section 1003 of the Internal Revenue Code*, and Treasury Regulations promulgated thereunder, because the gift funds

were forthwith invested in contracts, the obligations of which were to be discharged by payment in the future, and because for a period of ten years after the date of certain of the gifts (a period that ended before the minor donees attained their majorities), and for a longer time after the date of other of the gifts, a limited amount of control over the res of the gifts was lodged in the widowed mothers of the donees, who, in the case of the minor donees, was their natural guardian.

While tax liabilities for the years 1939 to 1941, only, are involved, the status of the 1938 gifts is material because of the cumulative provisions of the gift tax statute.

Statutes and Regulations Involved

The statute applicable to the three (3) taxable years involved in this proceeding is *Section 1003 of the Internal Revenue Code.* It reads as follows:

"Sec. 1003. NET GIFTS.

(a) General Definition.—The term 'net gifts' means the total amount of gifts made during the calendar year, less the deductions provided in Section 1004.

(b) Exclusions from gifts.

* * * * * * *

(2) Gifts after 1938.—In the case of gifts (other than gifts in trust or of future interests in property) made to any person by the donor during the calendar year 1939 and subsequent calendar years, the first $4,000 of such gifts to such person shall not, for the purpose of subsection (a), be included in the total amount of gifts made during such year."

For years prior to 1939, the amount excluded from taxable gifts (Sec. 1003 (b) (1) of the Internal Revenue Code) was $5,000.00.

The applicable Treasury Regulations are *Regulations 79* (1936 Ed.) *Article 11*, which reads as follows:

> "Art. 11.—Future interests in property.—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. 'Future interests' is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. *The term has no reference to such contractual rights as exist in a bond, note (though bearing no interest until maturity), or in a policy of life insurance, the obligations of which are to be discharged by payment in the future.* But a future interest or interests in such contractual obligations may be created by the limitations contained in a trust or other instrument of transfer employed in effecting a gift. * * * * * * (Emphasis supplied).

Statement

In 1938, Dora Roberts, petitioner herein, caused applications to be made to two Life Insurance Companies for the issuance by them of "Guaranteed Endowment Annuity" contracts in favor of three of her grandchildren,—two of them minors aged nine and twelve, respectively, and one an adult (R. 20 and 53). These applications were accepted; Mrs. Roberts

gave her check, or checks, to the Agent for each of the issuing insurance companies for the first annual premiums and the contracts were thereupon issued and delivered in 1938 to the grandchildren (R. 21 and 30). While Mrs. Roberts signed most of the applications for the policies, she did not obligate herself in any way for the payment of future premiums (R. 25).

The basic provisions of each policy called for annual premiums of a designated amount for a specified period of years until a named maturity date, at which time premium payments were to cease, and payments by the company to the annuitant of a specified sum of money each month for his lifetime were to commence (R. 25).

The provisions of each contract gave full value and benefit for each premium payment. The policies were not to forfeit if the payments did not continue, but reduced annuity payments would result. The due date of the first annuity installment (otherwise due some years in the future) could, by an election duly made, be advanced so that annuity payments could be demanded shortly after the issuance of the policy, but reduced annuity payments would likewise follow an election of this sort (R. 22 and 55).

In each of the policies the right to exercise the various options provided for in the contract was lodged for a period of time in the mother of the annuitant named in that particular policy. However, these options could be exercised by her only for the benefit of the named annuitant and for no other purpose. In some of the policies the powers thus confided to

the mothers of the annuitants terminated shortly before the minor annuitants attained their majority. In other of the policies these powers terminated at the death of the mother (R. 22-23).

In the years 1939, 1940 and 1941, Mrs. Roberts voluntarily paid the premiums becoming due on the policies for those years. These payments she included in gift tax returns, and claimed as to each donee the exclusions provided by *Internal Revenue Code, Section 1003 (b) (2)*. The exclusions were disallowed by the Commissioner on the grounds that the gifts were "of future interests in property," not allowable under that section. (R. 25, 26 and 54).

The aforesaid determination of the Commissioner of Internal Revenue was upheld by The Tax Court of the United States (R. 18) and the decision of The Tax Court of the United States was in turn affirmed by the Circuit Court of Appeals for the Fifth Circuit (R. 53).

Specification of Errors To Be Urged

The Circuit Court of Appeals erred:

1. In holding and deciding that the gifts of money with which to acquire the annuity contracts made by petitioner in 1938 were gifts of "future interests in property," as defined in Section 1003 (b) of the Internal Revenue Code.

2. In holding and deciding that the gifts of money made in the years 1939, 1940 and 1941, with which to pay premiums on the said annuity contracts were

gifts of "future interests in property," as defined in Section 1003 (b) of the Internal Revenue Code.

3. In failing to hold and decide that the said gifts were gifts of a present interest in property.

4. In failing to hold and decide that, with respect to the said gifts, petitioner is entitled to exclusions under Section 1003 (b) of the Internal Revenue Code totaling $15,000.00 for 1938, and $12,000.00, $12,000.00, and $12,000.00, for 1939, 1940 and 1941, respectively.

5. In holding and deciding that the net taxable gifts reported by donor for the years 1939, 1940 and 1941 should be increased by the respective amounts of $24,500.00, $34,800.00 and $46,400.00.

6. In adjudging and decreeing that petitioner is due deficiencies in gift tax for the calendar years 1939, 1940 and 1941 in the respective amounts of $1,423.34, $2,620.06 and $1,682.30.

7. In failing to adjudge and decree that petitioner is due no deficiency in gift tax for either of the said years 1939, 1940 and 1941 in any amount.

Reasons For Granting the Writ

The Writ should be granted because the holding of the Court below is in the teeth of the applicable statutes and regulations; because the holding of the Court below is in direct conflict with the principles laid down in its own decision in *Commissioner v. Kempner*, 126 Fed. (2d) 853; because the holding of the Court below is in direct conflict with the principles applied by the United States Circuit Court of Appeals for the Third Circuit in *William D. Diss-*

ton v. Commissioner of Internal Revenue, ... Fed. (2d) ....., decided July 12, 1944; and because the Court below decided an important question of Federal law which has not been, but which should be decided by this Court.

The Court below treated the gifts here involved, not as money gifts, but as successive gifts of fractional interests in annuity policies. Because, under the terms and conditions of these policies, (in the absence of an election to the contrary) the first payment to the annuitant was not immediately due and payable, the Court below, in the teeth of *Treasury Regulations 79, Article 11*, and contrary to the principles laid down by it in *Commissioner v. Kempner*, 126 Fed. (2d) 853, held the gifts to be gifts of future interests.

As to the minor annuitants, the holding of the Court below is in direct conflict, in principle, with the decision of the Circuit Court of Appeals for the Third Circuit in *William D. Disston v. Commissioner of Internal Revenue*, ... Fed. (2d) ...., decided July 12, 1944, which is to the effect that an immediate and irrevocable gift to a minor, not dependent for its consummation or continuation upon the happening of uncertain future events, constitutes the gift of a present interest, although control and management of the res of the gift and the income therefrom is, during the minority of the minor, vested in trustees who have sole discretion as to its use during the period of minority.

This Court, we are sure, judicially knows that many gifts to minors have been made in recent years.

Control and management of all such gifts, of necessity, must be lodged, during the period of minority, when the minor is incapable of acting for himself, with one other than the minor donee. Because of the importance of the question, whether the lodging of such limited control in another for a period of time requires such gifts to be classified as gifts of "future interests," and because of the conflict between the principles applied in the decision of the Court below in the instant proceeding, and in its decision in *Fondren v. Commissioner*, 141 Fed. (2d) 419, (Waller, Justice, dissenting), petition for certiorari filed May 19, 1944, now pending, with those applied by the Third Circuit Court of Appeals in *Disston v. Commissioner*, supra, it is believed that the writ should issue to the end that there may be an authoritative decision of this Court upon the question involved.

WHEREFORE, it is respectfully submitted that the petition should be granted.

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DORA ROBERTS,

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v.

JOSEPH D. NUNAN, JR.,
Commissioner of Internal Revenue,

Respondent.

Brief In Support of Petition For Writ of Certiorari To the Circuit Court of Appeals For the Fifth Circuit

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Opinions Below

The opinion of the Circuit Court of Appeals is reported at 143 Fed. (2d) 657. The opinion of The Tax Court of the United States is reported at 2 T. C. 679.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered July 7, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by 43 Stat., 938 (U. S. C. Title 28, Section 347).

Statutes and Regulations Involved

The statute applicable to the three (3) taxable years involved in this proceeding is *Section 1003 of the Internal Revenue Code.* It reads as follows:

> "Sec. 1003. NET GIFTS.
>
> (a) General Definition.—The term 'net gifts' means the total amount of gifts made during the calendar year, less the deductions provided in Section 1004.
>
> (b) Exclusions from gifts.
>
> * * * * * *
>
> (2) Gifts after 1938.—In the case of gifts (other than gifts in trust or of future interests in property) made to any person by the donor during the calendar years 1939 and subsequent calendar years, the first $4,000 of such gifts to such person shall not, for the purpose of subsection (a), be included in the total amount of gifts made during such year."

For years prior to 1939, the amount excluded from taxable gifts (Sec. 1003 (b) (1) of the Internal Revenue Code) was $5,000.00.

The applicable Treasury Regulations are *Regulations 79* (1936 Ed.) *Article 11*, which reads as follows:

> "Art. 11.—Future interests in property.—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. 'Future interests' is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which

are limited to commence in use, possession, or enjoyment at some future date or time. *The term has no reference to such contractual rights as exist in a bond, note (though bearing no interest until maturity, or in a policy of life insurance, the obligations of which are to be discharged by payment in the future.* But a future interest or interests in such contractual obligations may be created by the limitations contained in a trust or other instrument of transfer employed in effecting a gift. * * * * * * (Emphasis supplied).

Question Presented

Whether irrevocable gifts of money made by petitioner in the calendar years 1938, 1939, 1940 and 1941 are required to be classified as gifts of "future interests" and, therefore, excepted from the exclusions from taxable gifts provided by Section 1003 of the Internal Revenue Code and Treasury Regulations promulgated thereunder, because the gift funds were forthwith invested in contracts, the obligations of which were to be discharged by payment in the future, and because for a period of ten years after the date of certain of the gifts (a period that ended before the minor donees attained their majorities) and for a longer time after the date of other of the gifts, a limited amount of control over the res of the gifts was lodged in the widowed mothers of the donees who, in the case of the minor donees, was their natural guardian.

Statement

The statement of facts contained in the petition for certiorari (pages 3 to 5 supra) sufficiently de-

velops the salient facts. Reference to that statement is hereby made.

Specification of Errors To Be Urged

The Circuit Court of Appeals erred:

1. In holding and deciding that the gifts of money with which to acquire the annuity contracts made by petitioner in 1938 were gifts of "future interests in property," as defined in Section 1003 (b) of the Internal Revenue Code.

2. In holding and deciding that the gifts of money made in the years 1939, 1940 and 1941, with which to pay premiums on the said annuity contracts were gifts of "future interests in property," as defined in Section 1003 (b) of the Internal Revenue Code.

3. In failing to hold and decide that the said gifts were gifts of a present interest in property.

4. In failing to hold and decide that, with respect to the said gifts, petitioner is entitled to exclusions under Section 1003 (b) of the Internal Revenue Code totaling $15,000.00 for 1938, and $12,000.00, $12,000.00, and $12,000.00, for 1939, 1940 and 1941, respectively.

5. In holding and deciding that the net taxable gifts reported by donor for the years 1939, 1940 and 1941 should be increased by the respective amounts of $24,500.00, $34,800.00 and $46,400.00.

6. In adjudging and decreeing that petitioner is due deficiencies in gift tax for the calendar years 1939, 1940 and 1941 in the respective amounts of $1,423.34, $2,620.06 and $1,682.30.

7. In failing to adjudge and decree that petitioner is due no deficiency in gift tax for either of the said years 1939, 1940 and 1941 in any amount.

Summary of Argument

I.

The gifts here involved were present gifts of sums of money. If viewed as gifts of contractual obligations, they are nevertheless present gifts. The holding of the Court below to the contrary was based on the fact that certain control over the res of the gifts was lodged in the mothers of the donees. Certainly, in the case of the minor donees at least, this control was no more than would have been lodged in their mother, their natural guardian, by operation of law, and did not operate to convert what would otherwise be a present interest into a future interest.

Argument

I.

The statute excludes from taxable gifts for the calendar year 1938, the first $5,000.00, and for the calendar years 1939 to 1941, inclusive, the first $4,000.00 of gifts made within the year to any one person by a donor. The exclusion does not, however, apply in the case of gifts in trust or gifts of "future interests in property." The quoted term is defined by *Article 11 of Treasury Regulations 79* (1936 Edition) as "interests or estates * * * which are limited to commence in use, possession or enjoyment at some future date or time."

Petitioner contended in the Court below that the gifts with which we are here concerned were simple gifts of money, presently complete, and that the subsequent investment of them in annuity policies did not alter their nature. Clearly, if the gifts were gifts of money, they fall within the class of excluded gifts to the extent they do not exceed the sum of $5,000.00 or $4,000.00, respectively, to any one person in any one calendar year, and the exceptions contained in the statute do not apply.

The Court below thought otherwise (R. 54). It conceded that the donor could simply have given money to her adult grandson, or to a guardian or trustee for the minors, who might afterwards have invested it in the policies and that, had this been done, present gifts undeniably would have resulted (R. 54).

Because donor did not do this, but in 1938 took the money to Insurance Companies and procured them to issue their policies to the grandchildren, and in the later years paid the money herself to the Insurance Companies and thereby increased the sums payable under the policies, the Court below adopted the view that donor obtained contractual obligations from the Companies to her grandchildren and gave them those obligations. The first payment due, under the terms of these contractual obligations, was to be made (in the absence of a permitted election to the contrary) in a year subsequent to the year of gift. Because of this, the Court below held that the gifts were, under the statute, gifts of "future interests." We respectfully submit that this reasoning

of the Court below unwarrantably exalts form and procedure over substance.

The Tax Court found that physical possession of the annuity policies passed immediately to the donees (R. 30). As soon as payments were made by donor to the Insurance Companies, the amounts paid began immediately to earn returns, and there was created an obligation on the part of the Insurance Companies to make specified payments out of the invested funds and the accumulated earnings thereon to the several annuitants, which obligation, under the terms of the contract, was to be discharged by payment in the future. Accordingly, the annuitants began to "enjoy" forthwith, the benefits of the investments made on their behalf.

It is to be noted that in the test laid down by *Article 11 of Regulations 79* for determining a future interest, the terms "use, possesion or enjoyment" are used disjunctively.

The annuitants here had possession of the contracts. The amounts invested for their benefit by the donor were being used to earn additional funds which, under the obligations contained in the contracts, were to be paid to the annuitants at the maturity dates of the respective contracts. It is clear, therefore, that in the last analysis the decision of the Court below on review that the gifts here involved constituted gifts of "future interests" rested upon the fact that immediate payments under the annuity contracts could not be demanded by the annuitants without the active cooperation of their

mothers, in whom, under the contract, the right to exercise the option to advance the due date of the first payment under the contract was lodged.

The donor had parted with her money. The Insurance Companies were obligated to make payments of specified amounts at specified times to the annuitants. Neither the donor, the Companies, the annuitants, nor their mothers, had the right to change the payees under the contract and the only option or election that any one had in the premises was one vested in the mothers to demand the immediate, instead of deferred, payment of the sums due under the contracts. In the nature of things, a demand for immediate payment would have reduced the total amounts ultimately to be received by the annuitants under the contracts, and was not lightly to be made.

In the case of the two minor annuitants, their mother was their natural guardian. As such, the discretion reposed in her was a legal one and, therefore, reviewable by a Court of competent jurisdiction for an abuse thereof. Such discretion might not be exercised arbitrarily or capriciously and, we venture to assert that, had the annuitants been in want, the mothers could have been required by a proper proceeding to immediately demand and receive for their benefit such sums as the Companies were required, under the contract, to pay in the event of the exercise of the option to accelerate the due date of payments under the contract.

Because of this, we respectfully submit that an immediate and irrevocable gift was made by the

donor upon the payment of each premium on the policies. Such gifts did not depend for their consummation or continuation upon the happening of uncertain future events but constituted a transfer of a present interest, notwithstanding that provision was made for the accumulation of interest on the funds invested with the Companies during the minority of the minor donees, and that a different result does not follow solely because, during the period of minority, certain powers of control over the res of the gifts were lodged with their natural guardian.

Because the opinion of the Court below holds otherwise, it is in the teeth of the applicable statute and regulations, and is in direct conflict with the principles laid down in its own decision in *Commissioner v. Kempner*, 126 Fed. (2d) 853, and its decisions in the instant proceeding and in *Fondren v. Commissioner*, 141 Fed. (2d) 419, (Waller, Justice, dissenting), petition for certiorari filed May 19, 1944, now pending, are in direct conflict with the principles laid down by the Third Circuit Court of Appeals in *William D. Disston v. Commissioner of Internal Revenue*, ... Fed. (2d) ...., decided July 12, 1944.

Conclusion

It is respectfully submitted that the decision below is erroneous; deals with an important question of federal law; conflicts with other decisions of the Court below, and with decisions of another Circuit Court of Appeals, and that the petition for certiorari should be granted and the decision below reversed.

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No. 556

In the Supreme Court of the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 556

DORA ROBERTS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 18–32) is reported in 2 T. C. 679. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 52–55) is reported in 143 F. 2d 657.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 7, 1944 (R. 55). The petition for a writ of certiorari was filed on October 6, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether gifts of payments of premiums made in 1939, 1940, and 1941 on annuity insurance policies taken out for grandchildren of the taxpayer, one adult and two minors, were gifts of future interests and therefore to be included in taxpayer's net gifts under Section 504 of the Revenue Act of 1932 and Section 1003 of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are set forth in the Appendix, *infra,* pp. 14–17.

STATEMENT

This case involves deficiencies in gift taxes for the years 1939, 1940, and 1941. The facts as found by the Tax Court (R. 20–27) may be summarized as follows:

In 1938, the taxpayer made, or caused to be made, three applications to Aetna Life Insurance Company of Hartford, Connecticut (hereinafter called Aetna), and three applications to Connecticut Mutual Life Insurance Company of Hartford, Connecticut (hereinafter called Mutual), for the issuance of installment annuity contracts in favor of three grandchildren of the taxpayer (R. 20), two of whom were minors and one an adult (R. 35). Each of the six policies involved was

of the type termed a guaranteed endowment annuity (R. 24).[1]

Typical of the contracts executed by Aetna is that in favor of Roger Elwood Canter, annuitant, evidenced by policy No. AP 7 949. Under this policy, dated December 18, 1938, Aetna agreed to pay Roger (then nine years of age) a life annuity payable monthly to commence upon the anniversary date of the policy nearest to the age of the annuitant elected from a table beginning with the age fifty and ending with age sixty (R. 21). If the annuitant should die before reaching the age of fifty, the beneficiary of the policy will receive (R. 21–22)—

> a death benefit equal to the cash surrender value of this policy herein described for the end of the policy year in which death occurs (less any unpaid premiums for the current policy year) or equal to the total premiums paid hereon, whichever amount is greater.

The beneficiaries of the death benefits named in the policy are the mother or brother of the annuitant, if they survive him, and if not, then the executors or administrators of the annuitant (R. 22). The right to receive cash value and dividends and to exercise other privileges under

[1] It is necessary to describe but one policy issued by each of the two companies as it was agreed that they are typical of the others here in question. The two policies hereinafter described were incorporated in the record by reference and made a part thereof (R. 25).

the contract, is granted in the following manner (R. 22–23):

> During the lifetime of the annuitant, the right to receive all cash values, dividends and other benefits accruing hereunder, to exercise all options and privileges described herein, and to agree with the Company to any change in, amendment to, or cancellation of this policy shall vest alone in the life owner (hereinafter so called) designated as follows:
>
> Until the death of Eloise Roberts Canter, mother of the annuitant, said mother shall be the life owner, and after the death of said mother the annuitant shall be the life owner, Provided However, that neither said life owner shall have the right to surrender the contract for its cash value except on the following terms and conditions, to-wit:
>
> At any time before June 1, 1948, the life owner may elect that the cash value of the contract be payable to the annuitant in accordance with Mode 1, interest payable monthly, with the proviso that on June 1, 1948, the cash value shall then be payable to the annuitant in accordance with Mode 4 in monthly instalments for a fixed period of Ten (10) years and for as long thereafter as the annuitant shall live.
>
> On or after June 1, 1948, the life owner may elect that the cash value be payable to the annuitant in accordance with Mode 4 in monthly instalments for a fixed period

of Ten (10) years and for as long thereafter as the annuitant shall live.

All sums payable by the Company under this policy shall be payable at its Home Office. The death benefit will be payable under the terms hereof only upon receipt by the Company of this policy duly released.

Typical of the contracts executed by Mutual is that in favor of Roger, annuitant, evidenced by policy No. 996,867. Under this policy, Mutual agrees to pay an income of $1,248.50 per month for life to Roger E. Canter, beginning on the 21st day of December, 1984. The beneficiaries of the "Death Benefit Before Maturity Date," named in the policy, are the mother, aunt, cousin and brother of the annuitant, depending upon survivorship, with limitations on their method of enjoyment up to and after ten years from the date of the policy. (R. 23.) With respect to the exercise of privileges under this policy, it is provided (R. 23–24):

> The right to receive all cash values, loans, dividends and other benefits accruing hereunder, to change the beneficiary, to exercise all privileges and options contained herein, and to agree with the Company to any release, modification or amendment of this contract, shall, unless herein otherwise specifically provided, belong and be available without the consent of any other person, to Eloise R. Canter, if living, during

> the period prior to December 21, 1948; and subsequent to December *12,** 1948, or if said Eloise R. Canter be deceased, to the Annuitant.
>
> (*Note: Evidently a transposition of figures—December 21 is undoubtedly the date meant.)

But the policy carries the following indorsement (R. 24):

> Anything in the printed provisions of this Contract to the contrary notwithstanding, no person or persons entitled to exercise the privileges of this Contract shall have the right, power or privilege to change any beneficiary hereunder, withdraw any cash or loan values or dividends prior to December 21, 1948, and after said date only for the purpose of leaving such amounts under Option 2 or Option B or D, under the terms and conditions set forth in such options, for the benefit of the Annuitant.

Option 2 and Options B and D are all options exercisable by the annuitant at the maturity date of the contract (R. 24). This policy, No. 996,867, carries on its reverse side the following provision (R. 24):

> The Annuitant under this Contract is a member of this Company and enjoys thereby the advantages of annual participation in surplus earnings until the maturity date as provided in this contract

and the right to vote, in person or by proxy, at all meetings of its members.

The basic provisions of each policy call for premiums of $2,500 a year for a specified number of years until a named maturity date, and then a payment to the annuitant of a specified sum of money per month for life, beginning with the maturity date of the contract (R. 24–25).

At the time of the applications for all six of the annuity policies, taxpayer, who was the grandmother of the three proposed annuitants, gave her check, or checks, to the agent for the issuing insurance company for the first annual premium payable with respect to each of the annuity contracts. Taxpayer signed most of the applications for the policies but did not obligate herself in any way to pay future premiums on the policies. In the tax years involved, taxpayer made gifts to her three grandsons by paying on their respective behalves the annual premiums due under the annuity contracts. (R. 25–26.)

The taxpayer filed gift tax returns for the tax years 1939, 1940, and 1941 (R. 20). In computing her net gifts for those years, taxpayer claimed, as to each of the three grandchildren, the exclusion provided by Section 1003 (b) (2) of the Internal Revenue Code (R. 19).[2]

[2] For the year 1939, Section 504 (b) of the Revenue Act of 1932 is controlling.

The Commissioner disallowed all exclusions of the amounts paid in those years as premiums on the annuity policies, on the ground that the gifts are of future interests. And in ascertaining the aggregate sum of the net gifts made in the year 1938,[3] for the purpose of computing the tax for the years 1939, 1940, and 1941, the Commissioner disallowed the exclusions taken in 1938 on account of the gifts of the policies and premium payments made in that year. (R. 10–15.) The Tax Court found that the gifts in question are gifts of future interests and that the taxpayer is not entitled to any exclusions by reason thereof in 1939, 1940, and 1941, nor is she entitled to any such exclusions in 1938 in determining the amount of net gifts to be brought forward from that year to succeeding years (R. 32). The circuit court of appeals affirmed the Tax Court's decision (R. 55).

ARGUMENT

The statute excepts gifts of future interests from the exclusion allowed in determining the total amount of gifts made by taxpayer in any tax year. It does not define the term "future interests", but the definition given in Regulations 108, Section 86.11, and Regulations 79, Article 11 (Appendix, *infra*, p. 17), and specifically ap-

[3] Gift tax for the year 1938 is not in issue and is not affected by the determination of liability for the years 1939, 1940, and 1941.

proved in *United States* v. *Pelzer,* 312 U. S. 399, 403–404, and *Ryerson* v. *United States,* 312 U. S. 405, includes those gifts "which are limited to commence in use, possession, or enjoyment at some future date or time." The instant case involves three annuity contracts issued by the Mutual Company and three annuity contracts issued by the Aetna Company. Any benefits to be derived by the donees are necessarily controlled by the terms of these contracts, and the Treasury Regulations state that future interests may be created by the limitations contained in a trust or other instrument of transfer employed in effecting a gift (Appendix, *infra,* p. 17).

In support of her application for a writ of certiorari, the taxpayer asserts (Pet. 6–7) a conflict with *Commissioner* v. *Kempner,* 126 F. 2d 853 (C. C. A. 5th), and with *Disston* v. *Commissioner,* 144 F. 2d 115 (C. C. A. 3d), petition for certiorari filed, No. 589, October 12, 1944.[4] The *Kempner* case was decided by the Fifth Circuit Court of Appeals, as was the instant case, and was adequately distinguished in the opinion below (R. 54–55). In the *Disston* case, the trust instruments by which the gifts were made provided

[4] In support of the Government's application for a writ of certiorari, conflict with the following cases was asserted: *Welch* v. *Paine,* 120 F. 2d 141 (C. C. A. 1st); *Welch* v. *Paine,* 130 F. 2d 990 (C. C. A. 1st); and *Fondren* v. *Commissioner,* 141 F. 2d 419 (C. C. A. 5th), in which certiorari was granted on October 9, 1944, No. 88, this Term.

that income was to be accumulated for a beneficiary during his minority, but the trustee was directed to apply "such income therefrom as may be necessary for the education, comfort and support" (p. 117) of the minor. In the event of the beneficiaries' death during minority, the accumulated income was to pass as part of their respective estates. It was there held that the gift of income was a gift of a present interest. The court states (p. 118) that the gift did not depend upon the donees' survivorship or the happening of any uncertain future event.

Since the provisions of the Mutual contracts prevent enjoyment of any rights in all events for ten years, the situation is totally unlike that in the *Disston* case and in *Fondren* v. *Commissioner,* 141 F. 2d 419 (C. C. A. 5th), certiorari granted, October 9, 1944, No. 88, this Term, and the ruling below that these gifts are of future interests in no way conflicts, therefore, with the decision of the Third Circuit in the *Disston* case. Under the Aetna contracts, enjoyment of any part of the grandchildren's interests during their mothers' lives is contingent upon the exercise of their mothers' discretion. It is clear, therefore, that the holding of the court below that the interest of the adult grandchild is future does not conflict with the *Disston* decision. It may be said, however, that that ruling, as to the interests of the minor grandchildren, conflicts in principle with

the decision of the Third Circuit in the *Disston* case.

1. The annuity policies executed by the Mutual Company in 1938 provide that the Company will pay the annuitant a monthly income for life, beginning the 21st day of December, 1984 (R. 23). Those policies also provide that the right to receive all cash values, loans, dividends, and other benefits accruing, belongs and is available to the mother of the respective annuitants, if living, during the ten-year period prior to December 21, 1948; in the case of her death prior to that date, such rights are to belong to the annuitant (R. 23). But neither the mother nor the annuitant, as respective owners of the above rights, may withdraw any cash or loan values or dividends prior to December 1, 1948 (R. 24). There is, therefore, no possibility of present enjoyment by the beneficiaries as there was in the *Disston* case. Cf. *Wisotzkey* v. *Commissioner,* C. C. A. 3d, August 10, 1944 (P–H, par. 62,695).

2. Each of the Aetna policies, issued in 1938, provides that the Company will pay the annuitant a monthly income for life, beginning on the anniversary date of the policy nearest to the age of the annuitant elected from a table beginning with age 50 and ending with age 60 (R. 21). These policies also provide that the right to receive all cash values, dividends, and other benefits accruing, to exercise all options and

privileges, and to agree with the Company to any change in, amendment to, or cancellation of policies, should vest alone in the mother of the annuitant during her lifetime; after her death, the annuitant is to become the life owner (R. 22). Thus the beneficiaries may receive the available benefits of ownership during their mothers' lives only upon the exercise of their mothers' discretion (R. 22–23). While an interest the enjoyment of which is subject to such discretion has been properly held to be a future interest (e. g., *French* v. *Commissioner,* 138 F. 2d 254 (C. C. A. 8th); *Welch* v. *Paine,* 130 F. 2d 990 (C. C. A. 1st)), it may fairly be said that insofar as the two contracts for the benefit of the minor beneficiaries are concerned, the lower court's decision, like that in *Fondren* v. *Commissioner, supra,* conflicts in principle with that of the Third Circuit in the *Disston* case. However, we do not think that the *Disston* case is in conflict with the decision below as regards the Aetna contract for the benefit of the adult grandchild. The Court held in the *Disston* case that even where the income from a trust is payable to minors only upon the exercise of the trustees' discretion, there is a gift of a present interest. Its theory was that the gift in trust to the minors in that case was as complete as a gift to minors could lawfully be. But even if it can properly be said that there are such legal restrictions on gifts to minors, there

is no legal requirement that the enjoyment by the adult grandchild of his interest under the Aetna contract be made subject to his mother's discretion.

CONCLUSION

The decision of the court below is correct, and as to the gifts effected by the Mutual contracts and the Aetna contract for the adult grandchild, there is no conflict. However, we do not oppose the petition for a writ of certiorari in respect to the decision in relation to the Aetna contracts for the benefit of the minors, but certiorari on this petition, if granted, should be limited to those contracts.

Respectfully submitted.

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NOVEMBER 1944.

APPENDIX

Internal Revenue Code:

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. Gift taxes for the calendar years 1932–1939, inclusive, shall not be affected by the provisions of this chapter, but shall remain subject to the applicable provisions of the Revenue Act of 1932, except as such provisions are modified by legislation enacted subsequent to the Revenue Act of 1932.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * * (26 U. S. C. 1000.)

SEC. 1001. COMPUTATION OF TAX.

(a) The tax for each calendar year shall be an amount equal to the excess of—

(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over

(2) a tax, computed in accordance with the said Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.

* * * * *

(26 U. S. C. 1001.)

SEC. 1003. NET GIFTS.

(a) *General Definition.*—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 1004.

(b) *Exclusions from Gifts.*

(1) *Gifts prior to 1939.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year 1938 and previous calendar years, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

(2) *Gifts after 1938.*—In the case of gifts (other than gifts in trust or of future interests in property) made to any person by the donor during the calendar year 1939 and subsequent calendar years, the first $4,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year. (26 U. S. C. 1003.)

Sections 502 and 504 of the Revenue Act of 1932, c. 209, 47 Stat. 169, applicable to the tax year 1939, contain substantially the same provisions.

Treasury Regulations 108, promulgated under the Internal Revenue Code:

SEC. 86.7. *Computation of Tax.*—The first step in the determination of the tax is to ascertain the amount of the net gifts for the calendar year for which the return is being prepared. (For meaning of "net gifts," see section 86.9.) The second step is to ascertain the aggregate sum of the net gifts for each of the preceding

calendar years, considering only gifts made after June 6, 1932. By the words "aggregate sum of the net gifts for each of the preceding calendar years" (aside from the amount of the specific exemption deductible) is meant the true and correct aggregate of such net gifts, not necessarily that returned for such years and in respect to which tax was paid. In determining the aggregate sum of the net gifts for each of the preceding calendar years, the total amount of the specific exemption claimed and allowed for such preceding years should be deducted, except that if tax is being computed for the calendar year 1943 or for any calendar year thereafter such deduction cannot exceed $30,000, or if the tax is being computed for the calendar year 1940, 1941, or 1942 such deduction cannot exceed $40,000. (See section 86.12.) The third step is to add to the amount of net gifts for the calendar year for which the return is being prepared the aggregate sum of the net gifts for each of the preceding calendar years. The fourth step is to compute the tax upon the total amount of net gifts (as ascertained by the third step) by use of the rate schedule in force for the calendar year for which the return is being prepared. (See sections 86.5 and 86.6.) The fifth step is to compute a tax in accordance with the same rate schedule upon the aggregate sum of net gifts for each of the preceding calendar years only. The sixth step is to subtract from the amount of tax as computed in the fourth step the amount of tax as computed in the fifth step. The amount remaining after such subtraction is the tax for the calendar year for which the return is being pre-

pared, except in the case of a return for the calendar year 1940 or 1941.

* * * * *

SEC. 86.11. *Future Interests in Property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. The term has no reference to such contractual rights as exist in a bond, note (though bearing no interest until maturity), or in a policy of life insurance, the obligations of which are to be discharged by payment in the future. But a future interest or interests in such contractual obligations may be created by the limitations contained in a trust or other instrument of transfer employed in effecting a gift. For the valuation of future interests, see section 86.19 (*g*).

Treasury Regulations 79 (1936 ed.), promulgated under the Revenue Act of 1932, Articles 5 and 11, applicable to the tax year 1939, are substantially the same.

U. S. GOVERNMENT PRINTING OFFICE: 1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 556

DORA ROBERTS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner's Reply to Memorandum for the Respondent in Opposition to Petition

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In the memorandum filed for the respondent in opposition to the granting of the petition herein for a writ of certiorari, respondent concedes (Memorandum for the respondent, page 12) that the decision of the Court below, at least in part, like the decision of the same Court in *Fondren v. Commissioner*, 141 Fed. (2d) 419, (C. C. A.—5th) certiorari granted October 9, 1944, No. 88, conflicts in principle with the decision of the Circuit Court of Appeals in *Disston v. Commissioner*, 144 Fed. (2d) 115, petition for certiorari filed, No. 589, October 12, 1944. Respondent, therefore, does not oppose the granting

of the petition in respect to the decision of the Court below in relation to certain of the gifts involved in this proceeding (Memorandum, page 13) but asks that certiorari on the petition herein, if granted, be limited to those gifts alone.

Two basic issues are present in the case at bar. They are, first, whether the gifts involved were gifts of money or of contractual obligations. If the gifts were of money then, clearly, the decision below was wholly erroneous. If the gifts were of contractual obligations, a second issue is presented, to wit, whether the Court below correctly interpreted and applied Treasury Regulations providing that contractual obligations do not constitute "future interests" merely because the obligation of the contract is to be discharged by payment in the future.

Insofar as it relates to gifts of contractual obligations, the Treasury Regulations dealing with gifts of future interests, an important one in the field of gift taxation, should be, but has not been authoritatively construed by this Court.

In view of the concession made by respondent, certiorari on the petition herein will no doubt be granted by this Court. Two or more other cases, i. e., *Fondren v. Commissioner*, supra, and *Disston v. Commissioner*, supra, presenting related but not identical issues are due to be considered by this Court at the present term. Since several aspects of the Statutes and Regulations relating to "gifts of future interests" will thus be before this Court at this term for its consideration, we respectfully sub-

mit that review of the decision below should not be limited in any way but that the entire case should be brought before this Court, in order that it may be in position to consider and decide any and all questions inherent in the proceeding that it may deem to merit authoritative adjudication.

Conclusion

It is respectfully submitted that the decision below was wrong. It erroneously construed and applied an important Revenue Statute and Regulations promulgated thereunder. Concededly, it conflicts, in part at least, with the decision of another Circuit Court of Appeals. The petition for certiorari should be granted without limitation and the decision below reversed.

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